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Supreme Court, U.S.
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No. 10-1014

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
ex rel. Kenneth T. Cuccinelli, II, in his Official Capacity as Attorney General of Virginia.
Petitioner,

v.

KATHLEEN SEBELIUS,
Secretary of the Department of Health and Human Services, in her Official Capacity,
Respondent.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., DOCS 4 PATIENT CARE, JANIS CHESTER, M.D., MARK J. HAUSER, M.D., GUENTER L. SPANKNEBEL, M.D., AND GRAHAM L. SPRUIELL, M.D., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. In light of *Clinton v. City of New York*, should the Court overrule *Alaska Airlines v. Brock* because severance of an unconstitutional provision from a statute lacking a severability clause is a judicial line item veto?

2. Does the simultaneous enactment and revision of Section 1501 violate the Presentment Clause?

3. Does the Commerce Clause require at least a dyadic or exchange transaction?

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INTERESTS OF *AMICI* [1]

Amici Curiae ("*Amici*") are individual physicians and two associations of physicians whose memberships span the nation. *Amici* file this brief in support of Petitioner.

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS") has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g, Stenberg v. Carhart*, 530 U.S. 914 (2000) (citing an AAPS *amicus* brief). Because AAPS has also commenced an action against the Respondent which contains overlapping allegations of unconstitutionality, the disposition of this Petition may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Sebelius*, Case No. 1:10-cv-0499-RJL.

Amicus Docs 4 Patient Care is an organization of concerned physicians committed to the establishment of a health care system that preserves the sanctity of the doctor-patient relationship, promotes the quality of care, supports affordable access to all Americans, and protects patients' freedom of choice.

Amicus Guenter L. Spanknebel, M.D., privately practiced gastroenterology. He is a past president of

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of Record for both parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. Petitioner and Respondent consented to the filing of this Brief. Those consents are filed with the Court.

the Massachusetts Medical Society and is currently chair of its History Committee. He has also served as a Trustee of the Health Foundation of Central Massachusetts and on the faculties of the medical schools at Tufts University and the University of Massachusetts.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D. privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Graham Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

Amici have followed attempts in recent years to enact health care reform legislation. As active members of the medical profession and pursuant to their ethical obligations, *Amici* have carefully studied the introduction, passage and partial early implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 ("RA").

For the reasons set forth below, *Amici* believe ACA is unconstitutional. If upheld, ACA will undermine, in fundamental and dangerous ways, the practice of medicine and harm patients. *Amici* submit this brief in support of the Petitioner and urge the Court to grant *certiorari*.

I. THE PETITION SHOULD BE GRANTED IMMEDIATELY

ACA has divided our nation prior to enactment, during enactment and since enactment.

The Commonwealth of Virginia ("Petitioner") has challenged the constitutionality of the individual mandate contained in Section 1501 of ACA ("Section 1501") and of ACA itself. The United States District Court for the Eastern District of Virginia held Section 1501 is unconstitutional and severable from the remainder of ACA. Both parties appealed. *Commonwealth of Virginia, ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) ("*Virginia Action*"), *appeals docketed*, Nos. 11-1057 & 1058 (4th Cir.) ("*Virginia Appeal*"). Virginia filed its Petition under Rule 11.

Both parties acknowledged the urgency of this matter by jointly asking for expedited oral argument before the Fourth Circuit. According to both Petitioner and Respondent, "the constitutionality of the Affordable Care Act has public policy implications of the **highest magnitude**." Joint Motion to Expedite Briefing and to Schedule Oral Argument for May 2011, *Virginia Appeal*, at 3 (emphasis added).[2] The motion was granted. Order, dated January 26, 2011, *Virginia Appeal*, ("*Scheduling Order*").

Besides Petitioner, twenty-seven states have challenged Section 1501's and ACA's constitutionality. Twenty-six states are plaintiffs in *Florida v. United States Department of Health and Human Services*, (N.D. Fl.), Case No.: 3:10-cv-91 ("*Florida Action*")

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[2] *See also*, H. Res. 74 & 76 (112th Cong., 1st Sess.) (both resolutions urge judiciary to expedite consideration of ACA's constitutionality).

where the court declared Section 1501 to be unconstitutional and not severable from the remainder of ACA.[3] *Florida Action*, Doc 151. Conversely, in *Liberty University v. Geithner*, __ F. Supp. 2d __, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010) ("*Liberty Action*"), *appeal docketed*, No.10-2347 (4th Cir.) ("*Liberty Appeal*")[4], *Thomas More Law Center v. Obama*, 720 F.Supp. 2d 882 (E.D. Mi. 2010) ("*TMLC Action*"), *appeal docketed*, No. 10-2388 (6th Cir.) ("*TMLC Appeal*"), and *Mead v. Holder*, __ F.Supp. 2d ___, 2011 WL 611139 (D.D.C.) ("*Mead Action*"), *appeal docketed*, 11-5047 (D.C. Cir.) ("*Mead Appeal*"), the courts found Congress has power to enact Section 1501 under the Commerce Clause. In total, more than twenty cases have been commenced challenging ACA and its provisions. Plaintiffs/Appellants Petition for Initial *En Banc* Hearing, *Mead Appeal*, at 8 ("*Mead En Banc* Petition").

As co-defendant in the *Florida Action*, Respondent underscored her need for prompt judicial action regarding Section 1501's constitutionality and its severability from ACA. Memorandum in Support of Defendants' Motion to Clarify, *Florida Action*, Document ("Doc") 156 ("*Clarification Motion*"). "The importance of clarification is underscored by the variety of statutory provisions that would be subject to disruption if, contrary to defendants' understandding, the declaratory judgment was anticipated to operate as an immediate injunction with respect to the programs currently in effect." *Id.* at 7. In footnote 2, Respondent and her co-defendants argued

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[3] Oklahoma has recently commenced a separate action. *Oklahoma v. Sebelius*, Case No.: 6:11-cv-00030 (E.D. Ok.).

[4] The Fourth Circuit ordered the *Virginia Appeal* to be heard *in seriatum* with the *Liberty Appeal*. *Scheduling Order*.

the need for swift resolution of the issues in the *Florida Action* and pointed to this case. "Appellate review of the decisions that were issued prior to this Court's judgment is already proceeding on an **expedited basis**." *Id. at* 3 n.2 (referencing *Virginia*, *Liberty*, and *TMLC Appeals*) (emphasis added).[5] In response to the Clarification Motion, Judge Vinson said: "the sooner the issue [of ACA's constitutionality] is finally decided by the Supreme Court, the better off the entire nation will be." Order, *Florida Action* Doc 167 at 18 ("*Clarification Order*"). In construing the *Clarification Motion* as a motion for a stay, he granted Defendants a stay conditioned upon an appeal being filed within seven calendar days of the *Clarification Order* and "seeking expedited appellate review, either in the Court of Appeals or with the Supreme Court under Rule 11 . . . ." *Clarification Order* at 19. Defendants, including Respondent, timely appealed to the Eleventh Circuit for expedited review. Appellants' Motion for Expedition, *appeal docketed*, 11-11021-HH (11th Cir.) ("*Florida Appeal*"). Their motion was granted.

Amici acknowledge that typically the Supreme Court benefits by having issues and laws processed through the filter of the Courts of Appeals. Atypically, the issues in this case and the other cases challenging ACA have been extraordinarily well-briefed below. Among *amici* submitting briefs are

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[5] Respondent concurred with Appellants' Unopposed Motion to Expedite Appeal, *TMLC Appeal*, Doc 006110858182. The *Mead* Appellants have also sought to expedite the appellate process by requesting the Court of Appeals to sit *en banc*. *Mead En Banc* Petition.

three former Attorneys General of the United States[6], three Nobel Laureates in Economics[7], several states[8], numerous state legislators opposing the *Florida Action*[9], governors[10], members of the United States Senate[11] and House of Representatives[12], and numerous other organizations representing patients, physicians, hospitals and others.[13]

In addition to Section 1501, *Amici* believe that ACA contains scores of unconstitutional provisions which are not severable from the remainder of ACA.[14]

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[6] *Virginia Action* Doc 151 (Attorneys General Barr, Meese, and Thornburgh).

[7] *Florida Action* Doc 125 (Nobel Laureates Arrow, Akerlof, and Maskin).

[8] *Florida Action* Doc 130 (Oregon, Iowa, Vermont, Maryland and Kentucky)

[9] *Florida Action* Doc 126 (Brief filed by state legislators from 27 states).

[10] *Florida Action* Doc 133 (Governors Gregoire, Ritter, Granholm and Rendell); Doc 132 (Governors Pawlenty and Carcieri).

[11] Brief of Senate Majority Leader Harry Reid [*et al.*] in Support of Appellees . . . , *TMLC Appeal* ("*Dellinger Brief*"); *Florida Action* Doc 121 (Brief filed in support of Plaintiffs by Senator McConnell *et al.*).

[12] *Florida Action* Doc 119 (Current Speaker Boehner); *Florida Action* Doc 122 (Submitted by approximately sixty members of the House); Former Speaker Pelosi and several other Representatives were also listed as *amici* on the *Dellinger Brief*.

[13] Too numerous to specify.

[14] These provisions, including Section 1501, violate Article I, Section 7, Clause 2 of the Constitution ("Presentment Clause") because they were simultaneously enacted and amended. *See* Section III, B, 1, *infra*. Furthermore, the test for severability should be reexamined because severance of an unconstitutional provision from a statute lacking a severability clause is a

Consequently, quickly deciding ACA's constitutionality would unburden the federal Judiciary and Executive as well as the states from unnecessary and costly litigation. Assuming *arguendo* ACA is unconstitutional, delaying *certiorari* would cost the Treasury billions of dollars in unauthorized appropriations. During the delay, states, consumers, employers and others would spend additional billions of dollars to comply with an unconstitutional statute.

The Court should remember Lincoln's words: "[a] house divided against itself cannot stand." Speech of June 16, 1858 (Springfield, Ill.) *reprinted in* Yale Book of Quotations 460 (F.R. Shapiro ed. 2006). Granting *certiorari* immediately would accelerate our nation's healing by providing certainty regarding the constitutionality of Section 1501 and ACA.

II. THE PETITION IS "CERT. WORTHY"

Amici believe Congress lacks power to enact Section 1501 for two reasons. First, there is no power to regulate commerce because there is no commerce. *See* U.S. CONST. art. I, sec. 8, cl. 3 ("Commerce Clause"). Second, Section 1501 fails to comply with the Constitution's procedural requirements and substantive restrictions. Procedurally, Congress violated the Presentment Clause by simultaneously enacting and amending Section 1501. Substantively, Section 1501 invades the "private enclave" enjoyed by patients since the time of Hippocrates. *See United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980); *Miranda v. Arizona*, 384 U.S. 436 (1966).

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judicial line item veto, a judicial remedy which itself violates the Presentment Clause. *See* Section IV, *infra*.

Respondent's argument that Section 1501 is severable from ACA cannot succeed. Congress has declared and Respondent has argued Section 1501 is "essential" to ACA. Furthermore, even if Respondent could establish Section 1501's severability under *Alaska Airlines v. Brock*, 480 U.S. 678 (1987), severance (from a statute lacking a severability clause) is a judicial line item veto that transfers legislative power from Congress to the judiciary in violation of the Bicameral and Presentment Clauses – ignoring the principles set forth in *Clinton v. City of New York*, 524 U.S. 417 (1998). Severance is not, as previously held by this Court, a doctrine of judicial restraint. *Cf.* Order Granting Summary Judgment, *Florida Action*, Doc 150 at 64; Memorandum Opinion, *Virginia Action*, Doc 161 at 40.

> The Court observed that "[s]everability is a doctrine of judicial restraint," and that "just this past year," the Supreme Court reaffirmed that courts should "try to limit the solution to the problem," severing any problematic portions while leaving the remainder intact," and that the normal rule is that partial invalidation is proper. Op. 64 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3161 (2010).

Clarification Motion at 3. Rather, severance is a doctrine of judicial activism that allows, and possibly even encourages, constitutional sloppiness by Congress and the President. In light of *Clinton*, *Amici* suggest *Alaska Airlines* and its progeny should be overruled.

III. SECTION 1501 IS UNCONSTITUTIONAL

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Those powers are constrained by the Constitution's procedural requirements, *see e.g.*, U.S. CONST., art. I, sec. 7, and substantive restrictions, *see e.g.*, *Id. at* sec. 9.

A. Section 1501 is Not Based on Congress' Power to Regulate Commerce

Respondent has argued that Congress may enact Section 1501 under the Commerce Clause. Because Section 1501 does not involve any commerce, her argument fails.

Since ACA was enacted last year, the question of whether Congress has the power to enact Section 1501 under the Commerce Clause has arisen in many cases. Section 1501 was upheld in the *Liberty, Mead* and *TMLC Actions* but was declared unconstitutional in the *Florida* and *Virginia Actions*.[15]

Given the disparity of the opinions and the gravity of the issue, the question of Congressional power to enact Section 1501 should be decided by this Court. *Amici* offer the following analysis to the Court.

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[15] The courts in the *Florida* and *Virginia Actions* disagreed on whether Section 1501 is severable from ACA. The *Virginia Action* held Section 1501 is severable. The *Florida Action* held it is not severable.

1. The individual mandate involves no commerce

Congress lacks power to enact Section 1501 under the Commerce Clause. The language and structure of article I, section 8 make this clear. Under clause 3, the power is "to regulate" and the object of that power is "commerce". The Constitution does not give Congress power to regulate all commerce. Rather, the Constitution restricts Congress to regulating a set of only three types of commerce: (1) "with" the Indians; (2) "among" the several States; and (3) "with" foreign nations. All three members of this set necessarily involve at least a dyad or pair of parties. Without two or more parties, the words "with" and "among" are meaningless.

Therefore, in deciding this matter, the Court should undertake a two-step analysis. First, it should determine if Congress attempted to regulate "commerce." Only if this question is answered affirmatively, should the Court undertake step two, an analysis of the "interstate commerce" sub-clause.

With regard to step one, the key is to understand that "commerce" may be viewed as the interrelationship, traffic, agreement or transaction between parties. For example, we may see vendors paired with vendees; sellers paired with buyers; lessors paired with lessees; borrowers paired with lenders; and debtors paired with creditors. Expressed in mathematical terms, "commerce" is Euclid's line between two points or Einstein's interval between two points on an ideal rigid body, where the points represent the two parties and the line or interval represents the commercial transaction, agreement, traffic or interrelationship. Euclid, *Elements of Geometry* 6 (Greek Text of J. L. Heiberg (1883-1885))

(R. Fitzpatrick, ed. & translator) ("And the extremities of a line are points"); Albert Einstein, *The Meaning of Relativity* 4 (5th ed. 1956) (posthumously); Mark Ryan, *Geometry for Dummies* 22-23 (2008); *cf.*, Paul A. Samuelson, *Economics* 3 (10th ed., 1976) (Similar to the definition of commerce, "economics" is defined as requiring at least a dyadic relationship. "Economics . . . is the study of those activities which, with or without money, involve **exchange transactions among people**") (emphasis added).[16]

This Court has long understood and still understands that "commerce", by definition, necessarily involves two or more parties.

> The commerce power "is the power to **regulate**; that is, to prescribe the rule by which commerce is to be governed . . ." The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.
>
> > It is not intended to say that these words comprehend that commerce, which is completely internal, which is ***carried on between man and man*** in a State, or between different parts of the same State, and which does not extend to or affect other States. . . .

United States v. Lopez, 514 U.S. 549, 553 (1995) (*quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (Marshall, Ch. J.) (emphasis added).

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[16] Professor Samuelson's treatise was the most popular economics textbook of the second half of the twentieth century. He was Economic Advisor to President Kennedy and received the second Nobel Prize in Economics in 1970. Apparently, the 111th Congress, Respondent and *amici* who support her, ignore Samuelson's definition of "economics" in order to establish "substantial economic effects."

While "commerce" may occur between two people, between two entities, or between a person and an entity, there is no "commerce" when a single person or entity is involved. Since Section 1501 is an individual mandate, it does not pertain to a transaction, agreement, traffic or interrelationship between two parties. Rather Section 1501 attempts to regulate individuals **where no counterparty exists**. The individual mandate involves no "commerce". Without "commerce", there is no need to examine the interstate commerce sub-clause.

2. Courts may not rely on Section 1501's "findings" to establish Congressional power under the Commerce Clause

Amici believe the "substantial effects" test leads to false positive results and should not be the sole basis to establish Section 1501's constitutionality under the Commerce Clause.

Respondent has pointed to a litany of Congressional "findings" to argue that Congress properly enacted Section 1501 under the Commerce Clause – on the basis that the lack of adequate insurance coverage has a substantial effect upon the economy. Defendant's Motion for Summary Judgment, *Virginia Action*, Doc 91, at 4, 7, 8, 11-13, 15-16, 21, 26-27, 33 (pointing to findings in §§ 1501(a) & 10106(a). Applying this rationale, a court could easily find the other enumerated powers of Congress superfluous. The powers to declare war, establish post offices, and provide exclusivity for inventors obviously have substantial economic effects. Under Respondent's theory, these clauses are unnecessary.

While a court may refer to Congressional findings to support its conclusion that Congress has power to enact a provision, a court must be able to examine Congressional "findings" if judicial review is to have any meaning.[17] No deference is warranted. In this case, Congress presented findings which were based on numerous assumptions and extrapolations, some of which contradict each other. *Compare* Sections 1501(a)(2)(E) *and* 10106.

Whenever Congress presents "findings", those so-called "findings" are not facts at all, but rather something else – a conclusion based on a vote. Congressional "findings" often involve numerous extrapolations based on a plethora of assumptions. More than a century ago, Mark Twain humorously expressed the dangers of extrapolation as follows:

> In the space of one hundred and seventy-six years the Lower Mississippi has shortened itself two hundred and forty-two miles. That is an average of a trifle over one mile and a third per year. Therefore, any calm person, who is not blind or idiotic, can see that in the Old Oolitic Silurian Period, just a million years ago next November, the Lower Mississippi River was upward of one million three hundred thousand miles long, and stuck out over the Gulf of Mexico like a fishing-rod. And, by the same token any person can see that seven hundred and forty-two

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[17] When a court blindly accepts Congressional findings as facts, it amounts to a dereliction of its duties. Long ago, this Court said: "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1Cr.) 137, 177 (1803). It is not free to "close [its] eyes on the Constitution, and see only the law, [*e.g.* ACA]." *Id.* at 178.

> years from now the Lower Mississippi will be only a mile and three-quarters long. . . .

Daniel Huff, *How to Lie with Statistics* 142 (1954) (*quoting* Mark Twain, *Life on the Mississippi*).

Saying something is a fact does not make it so. For example, under Section 1501(a)(2)(E), Congress made the following finding: "Half of all personal bankruptcies are caused in part by medical expenses . . . ." In Section 10106 (which amended Section 1501), Congress made the following contradictory finding: "62 percent of all personal bankruptcies are caused in part by medical expenses. . . ." It is impossible for both "findings" to be true. Perhaps, neither is true.

Considering this internal contradiction and the inherent dangers associated with extrapolating a decade into the future, *Amici* respectfully suggest that the Court not defer to the Congressional findings in Section 1501 to establish the power of Congress to enact the individual mandate. The Court should question the validity of the underlying assumptions and extrapolations.

B. Congress May Not Violate Constitutional Constraints

It is axiomatic that a federal law must comply with the entire Constitution as amended. ACA has not come close. As physicians, *Amici* are concerned by the mandated invasion of patient privacy required by ACA. As citizens, *Amici* are concerned that Congress repeatedly violated the Presentment Clause by simultaneously enacting and amending many of ACA's provisions, including Section 1501. Therefore, the Court should grant the Petition and ultimately declare Section 1501 unconstitutional.

1. Section 1501 may not be enacted and amended simultaneously

Congress has simultaneously enacted Sections 1501 and 10106 of ACA. The former provision creates 26 U.S.C. § 5000A, 124 Stat. at 244, while the latter provision revises some portions of 26 U.S.C. § 5000A, 124 Stat. at 909. These provisions contain incompatible definitions of "penalty amount".

Congress may not simultaneously enact and revise any provision within the same statute because that simultaneity violates the Presentment Clause, the "single, finely wrought and exhaustively considered, procedure" which is used to enact Federal legislation. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951(1983); *Clinton*, 524 U.S. at 439-440.

Although simultaneously enacting and revising 26 U.S.C. § 5000A may have led to needless complexity, incongruity, and ambiguity for our citizenry and judiciary, the critical constitutional problem is that both the original and revised versions of Section 5000A were presented to the President at the same time Consequently, 26 U.S.C. § 5000A did not exist at the times the House and Senate passed H.R. 3590 nor did it exist when H.R. 3590 was presented to the President. Consequently, Section 10106 merely attempts to amend a nullity. For 26 U.S.C. § 5000A to be revisable, Section 10106 must be enacted after section 1501, not simultaneously with it.

Under the Presentment Clause, the President may only approve or veto a bill in its entirety. Because Sections 1501 and 10106 contained incompatible definitions of "penalty amount", it is impossible for the President to have approved H.R. 3590 (which

became ACA) in its entirety. The President's approval of the definition in 1501 contradicted the definition presented to him in 10106 and the President's approval of the definition in 10106 contradicted the definition in 1501. The incompatible definitions of "penalty amount" contained in Sections 1501 and 10106 prevent the House and Senate from having agreed on the definition of penalty amount. In other words, the House's definition under 1501 negated the Senate's definition under 10106 and the House's definition under 10106 negated the Senate's definition under 1501.

"[R]epeal of statutes, no less than enactment, must conform to Art. I." *Clinton*, 524 U.S. at 438. The same principle applies to revisions and amendment of statutes. Consequently, 26 U.S.C. § 5000A should not have been enacted and revised within the same statute. This unconstitutional practice completely infects ACA. Indeed, pursuant to Title X, Congress attempted to simultaneously enact and amend more than ninety ACA provisions.[18]

During debate over the Constitution's ratification, James Madison stated laws should be understandable, not too long, and "not be revised before they are promulgated." THE FEDERALIST No. 62, at 381 (Madison) (C. Rossiter, ed. 1961). He wrote:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so **voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be**

[18] 124 Stat. at 883-1024.

> **repealed or revised before they are promulgated,** or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Id. (emphasis added). Congress ignored Madison's warning and passed H.R. 3590, a 2400 page bill, which became ACA upon the President's signature. Within days of passing ACA, Congress also passed H.R. 4872 which became the Reconciliation Act. RA.

Given ACA's length and the number of simultaneously enacted and amended provisions, James Madison surely would have considered ACA too long and too incoherent to be understood. Indeed, ACA's length and complexity have not gone unnoticed. *See Clarification Order* at 16 ("[ACA], as previously noted, is obviously very complicated and expansive. It contains about 450 separate provisions with different time schedules for implementation."); *see also*, Michael O. Leavitt, *Health reform's central flaw: Too much power in one office*, Washington Post (February 18, 2011) (referring to nearly 2000 powers given to Respondent by ACA); *see also*, Ernst & Young, LLP, *Summary of the Patient Protection and Affordable Care Act, incorporating The Health Care and Education Reconciliation Act* (May 2010) (This summary is presented in a small font and is 159 pages long).

2. Congress may not invade a patient's privacy

The individual mandate is an assault on the confidentiality of the physician-patient relationship.[19] For more than two millennia, physicians and patients have understood that a patient receives better care if the patient candidly discloses private information, *e.g.* medical history, symptoms, and treatments, to the physician. U.S. Congress, Office of Technology Assessment, *Protecting Privacy in Computerized Medical Information*, OTA-TCT-576 (pages 5-6, 26-30) (U.S. G.P.O., Sept. 1993). To mandate the purchase of medical insurance and then to require disclosure of that insurance is tantamount to providing the government, as well as entities it outsources to, with a roadmap to patients' medical information. Under the Constitution, a patient has a right to a "private enclave" where his or her medical care and information is private. The individual mandate obliterates that enclave.

In *Westinghouse*, the Third Circuit eloquently applied the "private enclave" principle to a case involving confidentiality of medical information.

> There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the "private enclave where he may lead a private life."

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[19] This assault is compounded by Section 1502's compelled disclosure of coverage.

638 F.2d at 577 *quoting United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 931 (1957). In *Grunewald*, Judge Frank said:

> That right is the hallmark of our democracy. The totalitarian regimes scornfully reject that right. They regard privacy as an offense against the state. Their goal is utter depersonalization. They seek to convert all that is private into the totally public, to wipe out all unique "private worlds," leaving a "public world" only, a la Orwell's terrifying book, "1984." They boast of the resultant greater efficiency in obtaining all the evidence in criminal prosecutions. We should know by now that their vaunted efficiency too often yields, unjust, cruel decisions, based upon unreliable evidence procured at the sacrifice of privacy. We should be aware of moving in the direction of totalitarian methods, as we will do if we eviscerate any of the constitutional privileges.

Grunewald, 233 F.2d at 582. Previously, Judge Frank described the right to a "private enclave" in *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952).

> "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty – worth protecting from encroachment. A sane, decent, civilized society must provide some oasis, some shelter from public scrutiny, some

> insulated enclosure, some enclave, some inviolate place which is a man's castle."

On Lee, 193 F.2d at 315-16.[20]

The right to a "private enclave" underlies Fourth and Fifth Amendment jurisprudence. *Miranda*, 384 U.S. at 460; *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964) (privilege against self-incrimination); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415-16 (1966) (both the Fourth and Fifth Amendments involve the "right of the individual to be let alone"); *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (Fourth Amendment rights of public employees).

In *Miranda*, the Court showed a concern regarding creeping encroachments on individual liberties and also quoted *Grunewald* at a crucial point in its analysis.

> Those who framed the Constitution and the Bill of Rights were aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . The privilege was elevated to constitutional status and has always been "as broad as the mischief against which it seeks to guard . . ."
>
> Thus we may view the historical development of the privilege [against self-incrimination] as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privi-

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[20] This passage was quoted in *Silverman v. United States*, 365 U.S. 505, 511-12 n.4 (1961).

> lege has come rightfully to be recognized in part as an individual's substantive right, a "**right to a private enclave where he may lead a private life. That right is the hallmark of our democracy**." [*Grunewald*, 233 F.2d at 579, 581-582]. We have recently noted that the privilege against self-incrimination – the essential mainstay of our adversary system – is founded on a complex of values . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens.

Miranda, 384 U.S. at 459-60 (emphasis added) (citations omitted).

To protect personal medical information, the most private of private enclaves, an individual must be allowed to pay for medical care directly and not be required to purchase health insurance. Typically, at the moment a health insurance carrier enrolls an individual, it requires that individual to disclose his or her complete medical history. *See e.g.*, Empire BlueCross/BlueShield Form ENR02968 (Rev 1/11) at 5. Furthermore, as an insurance carrier pays claims to physicians, hospitals, pharmacies, *etc.*, on an individual's health insurance policy, the carrier amasses more of that individual's private medical information. By forcing individuals to purchase medical insurance, ACA destroys a patient's right and ability to keep medical information private.[21]

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[21] The risk of loss of private information is real. Today, many private insurers, federal agencies and their respective business associates outsource at least part of their operations. GAO, *PRIVACY: Domestic and Offshore Outsourcing of Personal Information in Medicare, Medicaid, and TRICARE*, Report No. 06-

To put a patient's constitutional rights in perspective, consider the victim and perpetrator of a violent crime. While *Miranda* allows a perpetrator to retreat into a "private enclave", ACA appears to prevent a victim-patient from totally remaining silent by compelling the victim-patient to disclose certain private information. The victim-patient's private enclave is thereby compromised. The victim-patient is put in a worse position than his or her attacker.

IV. ACA IS UNCONSTITUTIONAL BECAUSE SECTION 1501 IS NOT SEVERABLE

The traditional test for severability is well-known:

> "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted). While the Act itself contains no statement of whether its provisions are severable, "[i]n the absence of a severability clause, . . . Congress' silence is just that – silence – and does not raise a presumption against severability." *Id.* at 686. . . .

New York v. U.S. 505 U.S. 144, 186 (1992). Nor, as a matter of logic and judicial consistency, should that Congressional silence raise a presumption in favor of severability.

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676 (Sept. 2006). Therefore, a patient has little actual knowledge or control over who sees his or her confidential information.

Respondent is prevented from arguing that Section 1501 is severable if it is unconstitutional because she repeatedly admitted the individual mandate is "essential" to ACA. Defendant's Motion for Summary Judgment, *Virginia Action* Doc 91 at 1, 13-16, 25-29; Order Granting Summary Judgment, *Florida Action* Doc 150 at 63-64 ("the defendants concede that [the individual mandate] is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss"); Brief for Appellant, *Virginia Appeal*, Doc 21 at 34-39; *Clarification Order* at 6-8.

Furthermore, neither Section 1501 nor any other unconstitutional provision in ACA may be severed to save the remainder of ACA because severance is a judicial line item veto. In *Clinton*, Presidential line item vetoes were declared unconstitutional. 524 U.S. at 447-449. In *Chadha*, Congressional vetoes were declared unconstitutional. 462 U.S. at 959. Although this Court has, on occasion, severed defective provisions of federal statutes, *see e.g.*, *Alaska Airlines*, 480 U.S. 678, that remedy should be unavailable to courts in light of *Clinton and Chadha*. The Bicameral and Presentment Clauses require the House and Senate to pass precisely the same text – not a single word or punctuation may vary between the bills passed by each chamber. *Clinton*, 524 U.S. at 448. The judiciary, like the President, has no power to rewrite a statute. Furthermore, the idea that the judiciary be joined with the executive in a "council of revision" was considered and expressly rejected by the Drafters of the Constitution. Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as *Amici Curiae* in Support of

Appellees 9-10 in *Clinton v. City of New York* (Docket No. 97-1374).

In addition to violating the Constitution's letter and spirit, the practice of severing a defective provision from a statute lacking a severability clause is bad policy because: (1) it facilitates legislative sloppiness – a bill's author knows the constitutionality of its provisions will be addressed piecemeal; (2) it allows judicial activism – a court can substitute its own judgment for the legislative bargain that was struck in Congress and agreed to by the President;[22] and (3) it encourages omnibus legislation – which members of Congress may not have sufficient time to read and understand prior to casting their votes.[23]

Regardless of the deference accorded to Congress, this Court may not sever a defective provision from a statute in the absence of a severability clause because severance is a judicial line item veto. This practice substantially alters the dispersion of powers incorporated into the Constitution. It is time to return "all legislative power" to Congress as required by the Constitution's first clause. U.S. CONST. art. I, sec. 1, cl. 1.

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[22] Congress, like other legislatures, is an institution that is conducive to vote trading and logrolling activities. To enact a law, a majority coalition must be formed. Consequently, members of Congress often cooperate to further an individual or collective agenda. Passage of a bill might require the vote of a single member of Congress or Senator. If ACA had contained a severability clause, the legislative bargain made by members of Congress probably would not have been reached. Indeed, a severability clause was included in an early version of H.R. 3590, but was excluded from ACA, as enacted.

[23] The Presentment Clause directs "reconsideration" of vetoed bills – implicitly requiring members of Congress to actually "consider" a bill.

CONCLUSION

For the foregoing reasons, *Amici* believe that Section 1501 and ACA are unconstitutional and that the Petition should be granted.

Respectfully submitted,

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